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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 344

JOSEPH KANDALL,
*Petitioner,*

v.

THE UNITED STATES,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Washington, D. C. - THIEL PRESS - 202 - 393-0835

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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### INTRODUCTION

Carl L. Shipley and Rufus W. Peckham, Jr., attorneys for Joseph Kandall, petitioner herein, respectfully request on his behalf that the Supreme Court of the United States grant this petition for a writ of certiorari to review the decision of the United States Court of Claims in the above entitled cause.

## OPINION TO BE REVIEWED

The judgment of the Court of Claims which petitioner seeks to have reviewed is *Joseph Kandall v. The United States*, No. 403-65, which was rendered on February 14, 1969. That Court's opinion as reported is reproduced *infra* at page A-1 of the appendix to this petition.

## JURISDICTIONAL STATEMENT

The statutory provision conferring jurisdiction on this court is Title 28, United States Code, Section 1255 and petitioner verily believes the opinion of the Court below decides an important federal question of substance not heretofore determined by this court.

This petition is timely filed pursuant to extensions of time granted by the Chief Justice on May 2, 1969 and by Mr. Justice Brennan on June 25, 1969 extending petitioner's time to file same until July 15, 1969.

## QUESTIONS PRESENTED FOR REVIEW

1. Was it a gross abuse of discretion and hence a violation of due process of law for a federal agency to discharge an employee with over 28 years of honorable, faithful and unblemished service for violation of an agency's Rule of Conduct, absent a showing of willfulness or deliberateness?

2. Was the agency Rule of Conduct which petitioner was found to have violated so vague, imprecise and ambiguous as to be invalid?

3. When viewed in the light of the circumstances of this case, was the penalty invoked, dismissal from the federal service, so unduly harsh and so grossly disporportionate to the offense charged as to shock the conscience of the Court?

## CONSTITUTIONAL PROVISION INVOLVED

Amendment 5:

> "No person shall be . . . deprived of life, liberty or property without due process of law . . ."

## REGULATION INVOLVED

*"Rules of Conduct and Other Instructions for Employees of the Internal Revenue Service,"* an employees' handbook promulgated in March 1952 by the Bureau of Internal Revenue, United States Treasury Department, section 29:

> "*Financial Transactions.*—Employees must avoid all business or financial transactions with taxpayers having cases pending before the Bureau or field offices with which such employees have an official connection. Every situation should be avoided which involves any financial consideration between an employee and such taxpayers or their representatives."

## STATEMENT OF THE CASE

Petitioner, a career civil servant with approximately 28 years of honorable and faithful service to his country, was formerly a Grade 13 Supervisory Internal Revenue Agent employed in the Audit Division of the Internal Revenue Service at Brooklyn, New York.

In a letter dated September 12, 1963, signed by the Brooklyn District Director of the Internal Revenue Service, petitioner was notified that it was proposed to remove him or otherwise discipline him in order to promote the efficiency of the Service. That letter set forth the following reasons for the proposed action:

> Charge I: Financial Transactions with Taxpayers or Their Representatives with Whom You Had Official Connection, in Violation of Section 29, Rules of Conduct and Other Instructions for Employees of the Internal Revenue Service; dated March 1952.

Specification I: As an Internal Revenue Agent, you audited the 1949 tax return of Kinney Motors, 2166 Coney Island Avenue, Brooklyn, New York, closing the audit on July 9, 1951. In addition, four Internal Revenue Agents under your immediate supervision audited the tax returns of Kinney Motors. Specifically, Henry Marlin audited the 1951 and 1952 returns, closing the audits on March 1, 1954; Jacob Neuwirth audited the 1953 and 1954 returns, closing the audits on July 6, 1955; Hyman Orenstein audited the 1956 return, closing the audit on April 10, 1958 and John Seiff audited the 1959 return, closing the audit on January 25, 1961. In April 1958, you visited Mr. John Peters, Secretary-Treasurer of Kinney Motors who at that time was representing the firm in the audit of Kinney Motors conducted by Mr. Orenstein. It was your desire to buy a 1958 Chevrolet; however, as you stated in your affidavit of February 28, 1963 you were hesitant in buying it from Kinney Motors due to your official connection with them. You, therefore, made an arrangement with Mr. Peters which would purport to show that you had purchased your car from another agency. Specifically, on April 10, 1958 the records show that you purchased a 1958 Chevrolet Model, 1847, Serial No. F58T-171341, from the Roosevelt Chevrolet Corp., 70-05 35th Avenue, Jackson Heights, New York. You had no contact with the Roosevelt Chevrolet Corp., whatsoever. In fact, you have admitted that you purchased the automobile from Kinney Motors. Mr. Peters of Kinney Motors accepted your 1955 Chevrolet in part-payment of this purchase.

Charge II: As Group Supervisor Accepting for Assignment and Reviewing the Results of the Tax Examination of an Individual with Whom You Had a Financial Association.

Specification I: In 1955 Mr. Milton J. Bomback formed the Milbom Corporation, of which he was President. This was a syndicate of approximately twenty individuals.

In 1955, Mr. Bomback approached you in your office and you invested $5,000 in the Milbom Corp. On October 10, 1956 the Milbom Corp. was consolidated into a similar syndicate called the Jerilan Corp., of which Mr. Bomback was Vice President. In January 1956 Internal Revenue Agent Peter DeFeis, while under your supervision, audited the 1954 income tax return of Florence and Milton J. Bomback, and you reviewed and approved this audit. During this period, you had a financial interest in the Jerilan Corp.[1]

Petitioner admitted to purchasing the automobile in question but denied any wrongdoing or violation of the Department's Rules of Conduct. Petitioner's explanation of his activities was not accepted by his superiors and on or about November 12, 1963, he was discharged from the federal service.

Petitioner appealed his dismissal through the various appellate levels of the Civil Service Commission, but to no avail. In a decision dated October 22, 1964 the Commission's Board of Appeals and Review affirmed his discharge.

On November 17, 1965 petitioner filed suit in the United States Court of Claims alleging *inter alia* that his discharge was arbitrary and capricious; that section 29 of the Rules of Conduct was vague and ambiguous and that even if a violation of a valid rule had taken place it was of an unintentional, trifling, technical nature and that the penalty of dismissal was unduly harsh and excessive.

In a decision dated February 14, 1969, the Court of Claims rendered an opinion (reproduced *infra* commencing at page A-1 of the appendix) rejecting petitioner's claim and dismissing his cause of action.

This petition for a writ of certiorari follows therefrom.

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[1] A second specification under Charge II was subsequently dropped.

## REASONS FOR GRANTING THE WRIT

It will be noted from the concurring opinion of Judge Sketon (*infra*, page A-2) that at least one of the judges of the Court of Claims felt that petitioner's penalty was too severe. Indeed the language seems almost that of exasperation and despair; exasperation over the Service's harshness and despair that the Court of Claims will do nothing about it. Petitioner believes that this learned judge's implied anguish is enough, of and by itself to justify the court's granting certiorari, however, there are other equally compelling reasons.

In the first place it is submitted that section 29 of the Rules of Conduct which petitioner is charged with violating is so vague, imprecise and lacking in clarity as to be incapable of rational interpretation. The term "business or financial transactions" is nowhere defined, nor is the term "case pending."

Surely a federal employee is entitled to know with particularity precisely what sort of conduct is expected of him. He shouldn't be required to guess. Yet in this case petitioner has been discharged on the nebulous and ambiguous allegation that he had a business or financial transaction with a taxpayer who had a case pending. What is a "financial transaction"? Can any employee of the Internal Revenue Service possibly avoid at least some form of financial transactions with taxpayers in the normal course of their daily lives? Petitioner submits that they cannot and that in the absence of a clearly defined standard the prohibition borders close to an absurdity. The rule in question must be measured by Fifth Amendment standards of due process of law and to dismiss petitioner for violation of a vague, imprecise and ambiguous rule is a clear violation of due process, *Giaccio v. State of Pennsylvania*, 382 U.S. 399 (1966).

The Court of Claims held in *McGuire v. United States*, 145 Ct. Cl. 17, that a charging letter must state an offense within the meaning of the rule of conduct under

which it is proposed to be taken and that the final action must be taken on the basis of the charges made and proved by substantial evidence. Even assuming *arguendo* the validity of section 29 the record in this case is bereft of any evidence of intentional wrongdoing. The findings of fact by the Court of Claims Trial Commissioner which the Court of Claims adopted in its opinion fail to make any allegation that petitioner acted in a deliberately deceitful manner. Indeed there is not a scintilla of evidence that petitioner ever enjoyed any monetary gain whatever from his alleged transgressions save the nebulous finding that he "probably got a better price" on the automobile in question. It would be the grossest discrimination imaginable to prohibit a federal employee from bargaining (horse trading, if you will) over the purchase of an automobile simply because he is an Internal Revenue official. This Court cannot blind itself to the realities of retail automobile purchases in the United States as they exist today.

Petitioner concedes that the government must have some discretion in determining what reasons may justify removal of a federal employee (*Meehan v. Macy*, ___ U.S. App. D.C. ___, 392 F.2d 822 (1968) and cases cited therein) but it is equally clear that this discretion is not unlimited. The government's obligation to accord due process sets at least minimal substantive limits on its prerogative to dismiss its employees: it forbids all dismissals which are arbitrary and capricious (*Slochower v. Board of Education*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952); cf. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 898 (1961)). These Constitutional limits are even greater where, as here, the dismissal imposes a "Badge of Infamy," (*Wieman, supra* at 191), disqualifying the individual from all future federal employment, damaging his prospects for private employment, and fixing upon him the stigma of an official defamation of character. The courts have recognized that such consequences make a difference as to the requirements of due process. See *Cafeteria Workers, supra* at 898, and *Studemeyer v. Macy*, 116 U.S. App. D.C. 120, 121; 321 F.2d 386,

388, *cert. denied* 375 U.S. 934 (1963). See also *Greene v. McElroy*, 360 U.S. 474 (1959).

In the instant case the petitioner now stands forever branded as a high government official who betrayed his trust and was "on the take" for personal gain. A more infamous designation is difficult to imagine.

Petitioner earnestly submits that in the light of his 28 years of previous unblemished federal service the imposition and disgrace of dismissal is so unduly harsh and unwarranted as to constitute a gross abuse of discretion by the agency that demands redress by the court (*Clark v. United States*, 162 Ct. Cl. 477).

## CONCLUSION

WHEREFORE, the premises considered, petitioner submits that there are special and important reasons justifying the grant of a writ of certiorari in this case.

Respectfully submitted,

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Filed: July 15, 1969

# In the United States Court of Claims

No. 403–65

(Decided February 14, 1969)

## JOSEPH KANDALL v. THE UNITED STATES

*Rufus W. Peckham, Jr.*, for plaintiff. *Carl L. Shipley*, attorney of record. *Shipley, Ackerman & Pickett*, of counsel.

*Katherine H. Johnson*, with whom was *Assistant Attorney General Edwin L. Weisl, Jr.*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, NICHOLS and SKELTON, *Judges*.

### OPINION

PER CURIAM: This case was referred to Trial Commissioner Saul Richard Gamer with directions to make findings of fact and recommendation for conclusions of law under the order of reference and Rule 57(a). The commissioner has done so in an opinion and report filed on July 30, 1968. Exceptions to the commissioner's ultimate findings and recommended conclusion of law were filed by plaintiff, defendant filed a statement under Rule 62(b) electing to submit the case on the commissioner's report without exceptions and brief and the case has been submitted to the court on plaintiff's brief and oral argument of counsel. Since the court agrees with the commissioner's opinion, findings and recommended conclusion of law, as hereinafter set forth, it hereby adopts the same as the basis for its judgment in this case.* Therefore, plaintiff is not entitled to recover and the petition is dismissed.

*The concurring opinion of SKELTON, *Judge*, follows the opinion of the Trial Commissioner which has been adopted by the court.

OPINION OF COMMISSIONER

GAMER, *Commissioner:* Plaintiff, a former employee of the Internal Revenue Service in Brooklyn, New York, was discharged by the Brooklyn District Director on grounds relating to his financial transactions and associations with taxpayers with whom he had official connections. He appealed the dismissal to the New York Region of the Civil Service Commission, which, after a hearing, sustained the agency's removal action. Plaintiff's further appeal to the Commission's Board of Appeals and Review was also denied. His petition herein alleges his removal was, on various grounds, arbitrary, capricious, and unlawful. The court, by order of May 2, 1966, denied both defendant's motion and plaintiff's cross-motion for summary judgment and remanded the case to the commissioner for trial. Such a trial has been held.

Based upon a full review of the record, including the proceedings before the Internal Revenue Service, the Civil Service Commission, and this court, it is concluded, for the reasons set forth in the following detailed and ultimate findings of fact and conclusions of law, that plaintiff has failed to sustain his burden of showing that the actions of either the Internal Revenue Service or the Civil Service Commission were in any way arbitrary, capricious, or otherwise unlawful. Plaintiff's petition should, therefore, be dismissed.

SKELTON, *Judge*, concurring:

In my opinion, the penalty imposed upon the plaintiff was too severe. He had been a faithful employee of the Internal Revenue Service for over 27 years with an unblemished record. This, for all practical purposes, is a lifetime of useful service. There are many other circumstances in the case that are favorable to the plaintiff, all of which have been set forth and discussed by the trial commissioner and which will not be repeated here.

It must be conceded that plaintiff did violate the rules of the IRS, though he argues that at most the violations were mere technical ones. Nevertheless, the agency had the authority and discretion to determine and impose a penalty on the plaintiff and we are without power to substitute our judgment for that of the agency. There was no schedule of

penalties for violations of the rules, and, under these circumstances, the disciplinary action taken was a discretionary one to be made by the agency. It appears that the prescribed rules, regulations, and procedures were complied with in effecting plaintiff's removal. We cannot say that the action taken was not supported by substantial evidence nor that it was arbitrary, capricious, or so grossly erroneous as to imply bad faith. Neither can we say that the decision was so unduly harsh and unwarranted as to constitute an abuse of discretion by the agency that requires this court to hold the removal of the plaintiff to be unlawful and award him his back pay under the authority and reasoning of *Clark* v. *United States*, 162 Ct. Cl. 477, 484–5 (1963). In short, it appears that there is nothing we can do but allow the action of the agency and the administrative decision to stand undisturbed.

I realize that it is important, if not absolutely necessary, for the integrity and morality of Internal Revenue Service agents to be above reproach at all times. Their honesty and good character are taken for granted and must never be compromised. No doubt, the District Director felt that he was preserving these principles for the good of the service when he terminated plaintiff's employment.

Nevertheless, in my opinion, the facts do not justify the extreme penalty of discharge from the service that was given to the plaintiff in this case. A lesser punishment could have been given and may have been contemplated in the beginning. In this connection, it will be noted that the District Director notified plaintiff by letter that "it was proposed to remove him from the Service *or otherwise discipline him* in order to promote the efficiency of the service." [Emphasis supplied.][1] A severe reprimand, or a reduction in grade and salary, or a suspension for a period of time, or a combination of these, would have been adequate punishment for the plaintiff and would have served the purposes of the Internal Revenue Service just as well as the disciplinary action which it took, and would have been much more reasonable and considerate under all of the circumstances of this case.

[1] Finding 6.

## Findings of Fact

1. On November 12, 1963, plaintiff, a Grade 13 Supervisory Internal Revenue Agent employed in the Audit Division of the Internal Revenue Service at Brooklyn, New York, was, after the service of charges, removed from his position. Plaintiff's appeal to the Civil Service Commission was unsuccessful and on November 17, 1965, he filed his petition herein alleging his removal to have been arbitrary, capricious, and unlawful. By order of May 2, 1966, the court denied both defendant's motion and plaintiff's cross-motion for summary judgment [1] and remanded the case to the trial commissioner for trial. Accordingly, a trial was, after pretrial proceedings, conducted.[2]

2. On October 29, 1962, two Internal Revenue Service Inspectors interviewed plaintiff to afford him an opportunity to answer questions concerning information which the Service had received relating to certain of his activities. Plaintiff was advised that he had a right to decline to answer any question which he felt might be incriminating and that any answer he gave could be used against him in any proceeding the government might institute. Plaintiff stated he had no objection to proceeding, with his statements to be made under oath.

Among the subjects discussed was a Chevrolet automobile which plaintiff had purchased in 1958, at which time plaintiff was a Group Supervisor in the Field Audit Branch of the Audit Division (the same position he held in 1962). Plaintiff stated he had purchased the car from Kinney Motors, Inc., a dealer located in Brooklyn, New York.

Another subject discussed was an investment plaintiff had made in the Milbom Corporation, which was an investment syndicate consisting of twenty participants, as well as plaintiff's relations with one Milton Bomback, a former Revenue

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[1] Neither party had, by its motion, brought the record of the administrative proceedings before the court.

[2] At the pretrial conference defendant objected to the holding of a trial, contending that the court's determination of whether the agencies had acted arbitrarily, capriciously, or otherwise unlawfully, should be based only on a review of the administrative proceedings. Such objection was overruled by the commissioner, as set forth in his "Memorandum of Pretrial Conference" filed January 20, 1967, which memorandum also set the case down for trial. Defendant's request for review of such action by the commissioner was, by order of the court dated February 20, 1967, denied.

Agent through whom plaintiff had made the investment and who was one of the principals of the corporation. Plaintiff denied he had ever had any "official dealings" with Bomback. (The verbatim record of the interview was signed and sworn to by plaintiff on November 21, 1962.)

3. On January 17, 1963, plaintiff had another interview, under oath, with the same two Revenue Service Inspectors. Although the interview was considered as a continuation of the interview of October 29, 1962, plaintiff was given the same preliminary warnings. Plaintiff's purchase of the 1958 Chevrolet was again discussed and the following facts were disclosed: Plaintiff had no bill of sale for the car. However, the purchase price was in part financed, and plaintiff did have a retail installment contract. Although plaintiff insisted he had purchased the car from Kinney Motors, such installment contract showed the seller to be the Roosevelt Chevrolet Corporation. Plaintiff stated that he had no explanation for this; that he had no interest in the manner in which the sale papers were made out; that he had no knowledge of any relationship that Kinney and Roosevelt might have had between themselves or why the sale papers had been prepared in such manner; and that he had made no inquiry about the matter at the time. Plaintiff stated that he had purchased the car from Kinney through a Mr. Peters of that firm; that he had first met Peters in 1951 when, as an agent, he had conducted a tax examination of Kinney Motors' 1949 tax return, Peters then being Kinney's bookkeeper and the one who had supplied plaintiff with the books and the other tax data plaintiff required; that when he visited Kinney Motors at the time he purchased the car, he had, instead of dealing with a salesman, specifically asked for Peters who he felt would give him "the best possible price he could"; that he had made all payments on this purchase in cash; and that he had "probably" received "a better price" than "anybody else" would have received on a similar purchase of such a car "at that time." He denied that his obtaining the car from Kinney was influenced in any way by (a) the fact that he, as an agent, had conducted Kinney's tax examination in 1951; (b) that Kinney's returns had been examined by agents in his group (with the results of the examinations approved by

plaintiff) for the years 1951, 1952, 1953, and 1954, prior to his purchase of the car; and (c) that, at the time of the purchase, Kinney's return for 1956 was in the process of being examined by an agent in his group. The following answers were then given by plaintiff to the following questions:

*By Mr. Sobin:*

Q. Did you ever request that Kinney Motors not show the sale of the automobile to you?

A. I might have indicated that I didn't want to buy the car through Kinney Motors because of the possible misconstruing of my interest in them.

*By Mr. Gorman:*

Q. Why?

A. I thought inasmuch as . . . the only one I remember at that time who was doing an examination was Mr. Neuwirth, who had done it back in 1953. I don't recollect that Mr. Orenstein had made the examination and as far as Seiff was concerned this was merely a carry-back so that didn't mean anything.

Q. Now when you went in to purchase this car you did request Mr. Peters to handle the transaction in some manner so that it wouldn't show that Kinney Motors sold you a vehicle. Is that it?

A. I was reluctant about buying the car in the first place. He says well what difference does it make? This is what I would ordinarily sell it for at a good buy so there was nothing to be concerned about.

Q. Well why did you go to Kinney if you had reservations?

A. We passed by Kinney Motors and stopped in to look at the cars and I was in the market for one.

Q. But you wanted to get one with certain conditions. Is that correct?

A. By conditions you mean what?

Q. Well you did not want their books to show that the car was sold to you?

A. I was reluctant about buying the car there in the first place because of possible misconstruction.

Q. Well would you state then, that what was done, was to accommodate your request?

A. It might be possible.

Q. Well was it or wasn't it?

A. Finally when he indicated that it was . . . because of the fact he was giving it to me at a good buy and that's all, I didn't care how he showed it, if he even showed it on his records as a sale from him. It didn't make any difference.

*By Mr. Sobin:*

Q. But you did request that he not show your name?

A. I indicated originally that I was reluctant about buying the car from him. He may have indicated that probably it doesn't have to appear on the books. I don't remember the situation at that time.

*By Mr. Gorman:*

Q. Do you think that's how it happened?

A. It may have happened in that fashion.

Q. And why was this discussion necessary? Was it because of your position?

A. It was because I had remembered that Neuwirth had made the examination back in 1953, for the year 1953, I don't know exactly when, and I thought probably there might have been some thought that I was getting . . . .

Q. Something for nothing?

A. Something for nothing.

*By Mr. Sobin:*

Q. When the retail installment contract was received by you and showed the name of Roosevelt Chevrolet what did you presume then?

A. I presumed then that probably this was the way it was done but it didn't disturb me one way or the other. All I knew was I had to pay $80.81 a month for the next 24 months and that was the situation.

* * *

Q. You do admit, however, that the transfer of this vehicle to you was done in an unusual manner, partly to obscure your purchasing the car from Kinney Motors. Is that correct?

A. I assume that's what it was.

Q. And your reason for requesting this was because it might be construed, having had an official contact with Kinney Motors, could have been construed as maybe you were getting something for nothing?

A. Let me say that it was because of my reluctance to buy the car that it was done in this way, which I indicated before. I was reluctant to buy the car because it might have been, however remote, that there was some official relationship.

Q. It did not, in a final analysis, deter you?

A. No.

(The verbatim record of this interview was signed and sworn to by plaintiff on February 28, 1963.)

4. On February 28, 1963, plaintiff had a third interview, under oath, with the same two Revenue Service Inspectors. This interview was considered as a continuation of the previous interviews, but the same preliminary warnings were again given. Plaintiff was desirous of modifying some answers he had given during the interview of January 17, 1963, concerning an examination an agent in his group, a Mr. Neuwirth, had made of Kinney's tax return prior to plaintiff's purchase of the Chevrolet in 1958. At that time plaintiff had stated that during such examination by Neuwirth, plaintiff had not been in contact with Peters. The modification plaintiff desired to make was that, when Neuwirth was examining Kinney's 1953 and 1954 tax returns, plaintiff, as a supervisor, had visited Kinney's together with Neuwirth in 1955 and at that time did have contact with Peters in an official capacity, although plaintiff further stated that while it was Peters who handled the Kinney tax returns and the matters relating to Neuwirth's audit, plaintiff merely "acted as an observer and made no recommendation or suggestions at the time." Plaintiff also stated that, between 1951 and 1958, he had customarily had his cars serviced at Kinney's and that on each such occasion he asked to see Peters instead of simply dealing with the service department. (The verbatim record of this interview was signed and sworn to by plaintiff on April 12, 1963.)

5. (a) Under date of January 8, 1963, Mr. Walter E. Heingartner, President of Kinney Motors, Inc., executed an affidavit which stated, among other things, that Peters, who was Secretary-Treasurer of Kinney's, had handled the sale of the 1958 Chevrolet to plaintiff; that on March 10, 1958, Kinney had sold the car to the Roosevelt Chevrolet Corporation, although the car physically remained at Kinney's; that Heingartner had, prior to the sale, telephoned the President of Roosevelt Chevrolet and it was agreed between them that Roosevelt would purchase the car from Kinney and would then resell the car to plaintiff; that "the transaction although handled in an unusual manner was in no way intended to conceal the sale of an automobile to Mr. Kandall by Kinney Motors and was done only so that Mr. Barry [Roosevelt's President, who had formerly been Kinney's Secretary-Treas-

urer] could earn a reserve commission of between $40.00 and $50.00"; that "[t]o my knowledge Mr. Kandall paid a price comparable to the price paid by any other person making a retail purchase at that time. Also the trade-in allowance of $943.32 on Mr. Kandall's 1955 Chevrolet was in line with automobile values at that time."

(b) Under the same date, John Peters, Kinney's Secretary-Treasurer, executed an affidavit which stated in part that he was Secretary-Treasurer of Kinney Motors and prepared its tax returns; that he had had no contact with plaintiff between 1951, when plaintiff had conducted a tax examination of Kinney's 1949 and 1950 tax returns, and March 1958, when plaintiff purchased the new Chevrolet; that in connection with such purchase plaintiff had traded in a 1955 Chevrolet, upon which Kinney allowed $943.32; that plaintiff purchased the new 1958 Chevrolet "in the following manner": Kinney had purchased the car from General Motors on February 10, 1958, for $2,400; Kinney sold the vehicle to Roosevelt Chevrolet on March 10, 1958, for $2,469; the car was never physically transferred to Roosevelt; Kinney installed certain accessories, for which plaintiff paid $110; that, although Peters "handled the sale of the car to Mr. Kandall for Kinney Motors, it was sold to him by John Barry of Roosevelt Chevrolet," and that "[t]his was done to enable John Barry to earn a reserve commission of $40.00 to $50.00"; that "[t]his transaction although handled in an unusual manner was in no way intended to hide the sale of an automobile to Mr. Kandall by Kinney Motors"; and that plaintiff "paid a price comparable to the price paid by any other person making a retail purchase at that time, the trade-in allowance also having been in line."

(c) Under date of April 4, 1963, John J. Barry, President of Roosevelt Chevrolet, executed an affidavit which stated, among other things, that in March 1958, Heingartner had, by a telephone call, asked "as a favor to him to arrange the GMAC financing of a car for one of his customers"; that he did not know the customer and had no contact with him; that he had, accordingly, executed a retail installment contract, dated March 11, 1958, showing Roosevelt as the seller of the car and plaintiff as the purchaser; that Roosevelt's books

showed the receipt of a check from GMAC for plaintiff's account "in the amount of $1,599.75 plus a reserve commission of $35.10 which was received in connection with my handling of the GMAC financing"; that he had forwarded a check in such amount of $1,599.75 to Kinney "to cover the transaction"; and that Roosevelt's records also contained an official New York State Bureau of Motor Vehicles form of Certificate of Sale showing that Roosevelt had purchased the car from Kinney and had sold it to plaintiff; and that "[t]he vehicle was never in the possession of Roosevelt Chevrolet and the above transaction was done by me as a favor to Walter Heingartner, whom I have known since his childhood." [3]

6. By letter of September 12, 1963, signed by the Brooklyn District Director of the Internal Revenue Service, plaintiff was notified that it was proposed to remove him from the Service or otherwise discipline him in order to promote the efficiency of the service. The letter set forth the following reasons for the proposed action:

> Charge I: Financial Transactions with Taxpayers or Their Representatives with Whom You Had Official Connection, in Violation of Section 29, Rules of Conduct and Other Instructions for Employees of the Internal Revenue Service, dated March 1952
>
> *Specification 1:* As an Internal Revenue Agent, you audited the 1949 tax return of Kinney Motors, 2166 Coney Island Ave., Brooklyn, New York, closing the audit on July 9, 1951. In addition, four Internal Revenue Agents under your immediate supervision audited the tax returns of Kinney Motors. Specifically, Henry Marlin audited the 1951 and 1952 returns, closing the audits on March 1, 1954; Jacob Neuwirth audited the 1953 and 1954 returns, closing the audits on July 6, 1955; Hyman Orenstein audited the 1956 return, closing the audit on April 10, 1958 and John Seiff audited the 1959 return, closing the audit on January 25, 1961. In April 1958, you visited Mr. John Peters, Secretary-Treasurer of Kinney Motors who at that time was representing the firm in the audit of Kinney Motors conducted by Mr. Orenstein. It was your desire to buy a 1958 Chevrolet;

[3] Mr. Barry had executed a substantially similar affidavit on December 3, 1962.

however, as you stated in your affidavit of February 28, 1963 [4] you were hesitant in buying it from Kinney Motors due to your official connection with them. You, therefore, made an arrangement with Mr. Peters which would purport to show that you had purchased your car from another agency. Specifically, on April 10, 1958 the records show that you purchased a 1958 Chevrolet Model 1847, Serial No. F58T–171341, from the Roosevelt Chevrolet Corp., 70–05 35th Avenue, Jackson Heights, New York. You had no contact with the Roosevelt Chevrolet Corp. whatsoever. In fact, you have admitted that you purchased the automobile from Kinney Motors. Mr. Peters of Kinney Motors accepted your 1955 Chevrolet in part-payment of this purchase.[5]

Charge II: As Group Supervisor Accepting for Assignment and Reviewing the Results of the Tax Examination of an Individual with Whom You had a Financial Association

*Specification 1:* In 1955 Mr. Milton J. Bomback formed the Milbom Corporation, of which he was President. This was a syndicate of approximately twenty individuals. In 1955, Mr. Bomback approached you in your office and you invested $5,000 in the Milbom Corp. On October 10, 1956 the Milbom Corp. was consolidated into a similar syndicate called the Jerilan Corp., of which Mr. Bomback was Vice President. In January 1956 Internal Revenue Agent Peter DeFeis, while under your supervision, audited the 1954 income tax return of Florence and Milton J. Bomback, and you reviewed and approved this audit. During this period, you had a financial interest in the Jerilan Corp.

*Specification 2:* On June 20, 1958 you closed by survey before assignment, the 1956 income tax return of Florence and Milton J. Bomback while you had a financial interest in the Jerilan Corp., as set forth in Specification 1 to this Charge.

7. In March 1952, the Bureau of Internal Revenue, United States Treasury Department, promulgated a handbook entitled "Rules of Conduct and Other Instructions for Employees of the Internal Revenue Service." Plaintiff was then

[4] The three interviews referred to in findings 2, 3 and 4 were transcribed verbatim. As stated, plaintiff's statements were made under oath. Plaintiff executed a statement at the end of the transcription to the effect that he had read the entire transcription, that it was true, complete, and voluntarily given, and plaintiff was given a copy thereof. These transcriptions of the interviews are referred to as "affidavits."

[5] Specification 2 of this charge was subsequently dropped.

employed by the Service (having been so employed since 1935). He received a copy of such rules and was familiar with them. Section 29 thereof (also referred to as "Rule 29"), which was mentioned in the caption of Charge I in the notice of proposed adverse action, was as follows:

> *Financial Transactions.*—Employees must avoid all business or financial transactions with taxpayers having cases pending before the Bureau or field offices with which such employees have an official connection. Every situation should be avoided which involves any financial consideration between an employee and such taxpayers or their representatives.

8. By letter of October 1, 1963, to the District Director, plaintiff replied to the charges and specifications contained in the District Director's letter of September 12, 1963. As to Charge I, Specification 1, plaintiff stated:

> As a field agent, I audited in 1951 the 1949 tax return of Kinney Motors Inc. My report was reviewed and approved by my superiors through customary and procedural channels. About March of 1955 I purchased a new Chevrolet. About March 1958, my wife and I decided to trade our old Chevrolet for a new one. I inclined towards Kinney. I had discontinued using the dealer from whom I had purchased the 1955 Chevrolet since their servicing was poor. On several occasions I had used Kinney's service and found it satisfactory. I went to Kinney and talked with Mr. Peters. I recalled to him that some years back I had audited a Kinney return and that I had some hesitancy in making the purchase. He remarked in substance that he could not see any reason why Kinney should suffer.
>
> > "I was reluctant about buying a car in the first place. He (Mr. Peters) said, well what difference does that make? That is what I ordinarily would sell it for a good buy so there was nothing to be concerned about. (Page 81, Interview January 17, 1963.)"
>
> A sale was concluded by a down payment of $120.13 plus my old car and a G.M.A.C. loan. During the interview of January 17, 1963, when asked where and from whom I purchased the car, I answered from Kinney Motors. I did not attempt to conceal the fact that my dealings were with Kinney. I made no request or suggestion that the Kinney Company name be submerged. To this date I am not aware of the relationship between Kinney and Roosevelt Chevrolet through which com-

pany Kinney cleared the sale. My down payment was made to Kinney Motors.

Concerning the agents who audited the Kinney returns in subsequent years, I did not control the assignments of such returns to my group or to specific agents, since they came down through the Control Section, over which I obviously and clearly had no control. It is a coincidence which happens occasionally with the same taxpayer, considering the large number of returns filed in the Brooklyn office. I state herein, that at no time have I ever exercised any influence over agents in my group, or directed them, in any devious or self serving manner, or in any manner that would or could inure to my personal gain or benefit. I respected them and they respected me with reliance that the best interests of the Internal Revenue Service would be foremost in the performance of our duties without favor or prejudice to anyone.

Further may I point out that practically every automobile agency in this district, at one time or another has or has had one or more years under audit; under an extreme interpretation of Section 29, anybody in a supervisory position in this district would be precluded from transacting business as they could be considered to "have official connection" with such firms. It appears that Section 29 fails to explain or define where "official connection" begins or ends.

As to Charge II, plaintiff stated:

*Specification 1:*

Mr. Milton Bomback left the service in the early fifties and subsequently entered the brokerage business. He formed Syndicates, each comprising about 20 individuals who would contribute to a fund used to buy and sell securities. He urged I join one of these syndicates. I was not interested. He kept after me, always impressing upon me that his syndicates were very successful; that many had doubled and tripled in value. He eventually convinced me, in 1955, to invest in Milbom Corporation, which in October 1956 consolidated with the Jerilan Corp., thereby increasing the number of participants. Unfortunately, the investment was a poor one from the beginning.

May I emphasize that these syndicates were open to anybody and that no special or favored treatment was accorded to me.

Agent Peter DeFeis' examination in 1956 of the personal return of Mr. & Mrs. Bomback was for 1954. He performed a thorough audit. I saw no wrong in approving his report.

*Specification 2:*

This specification must be viewed in the light of actual office procedure prevalent in 1958. Before the end of each fiscal year (usually in June) our office was desirous of eliminating prior years from our unassigned control files (audit service) in order to make room for more current returns. All these returns were selected returns which would in the normal course have been audited if we had sufficient manpower.

A mass survey before assignment would then be made involving as many as several thousand returns. Each group would be given a few hundred returns and asked to eliminate by survey the major portion of them, retaining only those with high tax potential.

Each group supervisor would assign some of his senior agents for the purpose of assisting in this survey. Though the survey may in fact have been made by a senior agent—the supervisor alone initialed the return. I have no recollection of having myself made the survey. There would appear to be no question, however, that the survey was made in my group since the approving initials apparently are mine. * * *

9. On October 17, 1963, plaintiff (apparently pursuant to his request) was given the opportunity of making an "oral reply" to the Chief of the Brooklyn District's Administrative Division, who was appointed by the District Director to hear such reply and accept any additional information or evidence plaintiff wished to submit.

As to the matter of the purchase of the automobile in 1958, plaintiff stated, among other things:

> * * * the fact that I observed to him [Peters] that I had some misgivings with respect to my purchase of the car because I did have this examination that I made seven years previously, indicates that I observed the rules of conduct militantly. * * * Even by the remotest possibility if it was in the back of my mind that the fact that I had made an examination previously, there was some misgivings because I am so sincere about it, and so conscientious I don't think that I should be penalized. I think it indicates good faith the fact that I even had it in the back of my mind.

He admitted that, at the time he purchased the car, Kinney Motors' income tax return was being examined by an agent in his group, but denied that he was then aware of such situa-

tion. As proof he sought no favors from Kinney, he pointed to the fact that he had not purchased his 1955 Chevrolet from Kinney despite his 1951 audit of Kinney's return and the subsequent audits of Kinney's returns in his group. He further stated that he had purchased the 1958 car from Kinney because of his satisfaction with its servicing of his previous car, his respect for it as an outstanding firm, and his belief that he would be treated fairly; that "the only explanation" he could give as to how Roosevelt Chevrolet entered the picture was

> * * * the fact that because I indicated that I did have some misgivings with respect to purchasing the car from Kinney because of my audit. * * * He [Peters] probably, to allay my sensitivity might have handled the paper through some other company * * *, not that I had any desire, as far as I was concerned, as long as I satisfied myself that my sensitivity was a little far-fetched. I had no more, no question about it, I did not care how he handled it. This was up to him as far as I'm concerned, because if it was a matter of my wanting to hide it in any way, this is no way, this is absolutely to no purpose. It would have been my suggestion, I imagine, if I so desired, for him to send me to another Chevrolet dealer and have the entire transaction come from the other Chevrolet dealer. That's the only way I could possibly figure anybody would make the transaction that they wanted to hide, but in this particular case I hid nothing.

He further stated that he was not concerned with the fact that, although he felt he was purchasing the car from Kinney, the papers showed the sale was made by Roosevelt; that, despite his apprehension about the purchase, he did not believe it was necessary to check with his superiors, since he felt reassured by Kinney's having "pooh poohed" his "misgivings * * * because it was being a little too sensitive with respect to a transaction that occurred seven years previously"; that the audits of the Kinney returns made by his group subsequent to 1951 and prior to the 1958 purchase of the car were performed pursuant to assignments of "cases"[6] made by the District's Control Section, and not by plaintiff, and that he had exercised no control over any of the audits

[6] In the terminology of the Service, a return that is to be examined or audited is a "case."

made by the agents in his group; that the theory that a supervisor could not purchase a car from a dealer whose return had been audited in his group could be carried "to a ridiculous degree" since it would mean that the District Director could not purchase a car from any dealer located in the Brooklyn District; and that, on the same basis, since the return of the Brooklyn Union Gas Company was being audited in his group, the contention could be made that his purchasing gas from such company for his home (which he was doing) resulted in a conflict of interest.

As to Specification 1 of Charge II, plaintiff stated that the "financial association" he had with Bomback consisted only of his investing in the syndicate in 1955, and that "[t]his was a situation where I did something for him by investing in this particular club to enable him to earn commissions," since Bomback had recently gone into the brokerage business, and his employment of the syndicate funds to buy and sell securities would enable him to earn such commissions; that he did not "consider this any more than my having purchased a mutual fund"; that this relationship with Bomback did not result in his being indebted to Bomback for anything and which would cause him, by approving reports of examinations of Bomback's returns, or otherwise surveying such returns, to give Bomback any benefit; that the particular agent who, in 1956, audited the 1954 return of Bomback (and his wife) did not even know at the time that plaintiff knew Bomback; that such agent "does a very fine job" and "makes an extremely thorough audit" and that "I think I would be remiss if I took this particular report and gave it to another group supervisor to approve."

As to Specification 2 of such charge, plaintiff stated that the procedure whereby he closed by "survey before assignment" the 1956 income tax return of Bomback (and his wife), was as follows: The Audit Division, in an attempt to reduce the backlog of unexamined returns at the close of a fiscal year, forwarded to each group supervisor several hundred returns that had been previously selected for audit. Each supervisor was then responsible for eliminating around fifty to seventy percent of the returns from the audit requirement. The supervisor distributed some returns to certain agents in his group. The supervisor and such agents would then, by a gen-

eral survey, determine which returns indicated the least potential for tax deficiencies. He further stated, however, that the supervisor was ultimately responsible for the selection of those returns which were closed by this "survey before assignment" procedure since he was required to initial each return so closed; that Bomback's 1956 return happened to be included in the batch of returns that was sent to his group and was so surveyed out; that when he initialed the return for such elimination, he had no misgivings that his action might be misconstrued since he did not feel that he had had any kind of financial arrangement or transaction with Bomback which might motivate him to benefit Bomback in any way.

At the time plaintiff made this "oral reply," he had had 28½ years of service with the Internal Revenue Service (or its predecessors in the Treasury Department). He had entered the Service on May 1, 1935, as a Grade 7 Field Auditor. He was promoted to Group Supervisor in 1953.

**10.** By letter of November 7, 1963, the District Director advised plaintiff that "[a]fter careful consideration" of the charges against him, and of his written and oral replies, "it has been decided that charge I and specification 1 thereto, and charge II and specifications 1 and 2 thereto, which are supported by substantial evidence are sustained and warrant your removal." The letter further stated in part:

> Your statements in refutation of charge I, specification 1 are not supported by credible evidence and do not overcome the substantial evidence supporting the specification. Regarding charge II, specification 1 and 2 you attempt to mitigate them by saying your actions in these instances were cursory. However, the charge and specifications are not refuted and the seriousness of your neglect cannot be condoned.

The letter advised that plaintiff would be removed from the Service effective November 12, 1963, "in order to promote the efficiency of the Service."

**11.** Plaintiff was removed from his position effective November 12, 1963. At that time his salary was $13,340 per annum.

**12.** On November 15, 1963, plaintiff, by his attorney, appealed his dismissal to the Civil Service Commission.

13. By letter of November 18, 1963, an Appeals Examiner of the Civil Service Commission's New York Region notified the Internal Revenue Service of the appeal and requested certain data, including "[t]he evidence relied upon to support the charges or reasons for the adverse action appealed." In response, the Service sent a number of documents, including the following: (a) plaintiff's "affidavits" referred to in findings 2, 3, and 4; the Heingartner, Barry, and Peters affidavits, referred to in finding 5; a "Certificate of Sale" dated March 10, 1958, showing the sale of the 1958 Chevrolet by Kinney Motors to Roosevelt Chevrolet; and forms showing the action plaintiff had taken with respect to the Kinney Motors and Bomback tax returns previously mentioned.

14. (a) On December 24, 1963, plaintiff submitted an affidavit in support of his appeal in which he stated, in part, that he had not received any favors or preferential treatment and that "[t]he mere fact that a taxpayer's business is under audit does not necessarily preclude an Internal Revenue employee from patronizing said taxpayer"; that "Section 29 is too general, indefinite and too vague"; that even assuming he was "guilty of an error in judgment," it was merely a "technical breach of the rules without wrongful intent" which was "not sufficient to warrant the discharge of an employee with a record of faithful service"; and that "[t]he penalty of dismissal was too drastic and too severe." He requested that affidavits be obtained from Agent DeFeis concerning his audit of the Bombacks' 1954 tax return and that affidavits be obtained from Field Audit Branch Chief Salvatore J. Carruba and George D. MacDonald, Assistant Chief of the Audit Division, concerning the "survey before assignment" procedure.

(b) The affidavits plaintiff requested be procured were obtained, as follows:

(1) MacDonald, by affidavit of January 15, 1964, stated that "the responsibility for such survey was each group supervisor's alone"; that plaintiff's initials on the Bomback return indicated "that he had surveyed that return," and that "there was no review of" plaintiff's "decision to close by survey before assignment."

(2) DeFeis, by affidavit of January 15, 1964, stated that the 1954 Bomback return was assigned to him for audit by plain-

tiff on January 3, 1956, and that his report was reviewed and approved by plaintiff; that at no time had plaintiff attempted to influence him in connection with such audit (or any other audit); that his audit resulted in "some slight adjustment in expenses, which resulted in some additional tax liability of a minor nature"; that there were no changes made in his audit; and that at that time he did not know that plaintiff knew Bomback.

(3) Carruba, by affidavit of January 15, 1964, stated that in 1958 "the practice of closing by survey before assignment may have entailed the review by each Group Supervisor of anywhere from 25 to 200 returns" (being an estimate based upon his then recollection); that over the years, he had had Senior Agents in his group assist him in reviewing returns for "possible closing by survey before assignment" and that after such preliminary review by such agents, he would review "those recommended for closing by survey and then place my initials on the face of the return"; that "[a]ll Group Supervisors knew it was our responsibility" and that "[t]here was no automatic review of our action of closing by survey before assignment."

15. (a) By affidavit of February 5, 1964, which was submitted to the Civil Service Commission, the Brooklyn District Director stated that plaintiff "knew that he had had close official connection with Kinney Motors" and that plaintiff "did not wish to have the sale of the Chevrolet recorded as having been purchased from" Kinney; that "[t]here is no doubt that Mr. Kandall was aware of the subterfuge used as is evidenced by the retail installment contract with Roosevelt Chevrolet Corporation which Mr. Kandall signed on March 11, 1958" (a copy of which was attached to the affidavit); that "the fact that Mr. Kandall received a benefit through this arrangement is shown on page 79 of his affidavit of April 12, 1963, in which he was asked if he thought he got a car at the same price that anybody else would have paid for it at that time," and he answered that "'probably I got a better price'"; that at the very time of the purchase "Mr. Hyman Orenstein, an agent under his supervision, was currently examining the 1956 tax return of Kinney Motors"; that, as to his relationship with Bomback, "[k]nowing him personally

as a former Internal Revenue Agent and through this investment syndicate [Milbom Corporation], it was incumbent upon Mr. Kandall to disqualify himself from the review of the results of the tax examination of Mr. Bomback"; that the facts set forth in DeFeis' affidavit "in no way relieves Mr. Kandall of the responsibility of disassociating himself completely from any official connection with Mr. Bomback," and that "[h]is initials on the agent's report constitute approval of that report"; that, as to the closing by survey before assignment, plaintiff "should have been fully cognizant of the seriousness of" such a closing and that "[d]ue to his association with Mr. Bomback he should have immediately referred the return to his superior"; that plaintiff's "[d]efending his action by stating that he signed an important document without noticing the name on the document is a sad commentary on Mr. Kandall's views of his responsibilities as a supervisor"; and that "[t]he Internal Revenue Service does not use a standard code of penalties."

(b) The copy of the retail installment contract, dated March 11, 1958, attached to the affidavit, showed plaintiff as the buyer of the car and Roosevelt Chevrolet Corporation as the seller.

**16.** By an affidavit of February 21, 1964, Peters stated that he saw no reason why his firm should lose a customer simply because it had "some official dealings with an agency where the customer was employed"; that the car plaintiff had traded in and upon which Kinney had allowed plaintiff $749.12 had been resold for $1,275, which, after reconditioning costs, had resulted in a net profit of $303.04 to Kinney; and that plaintiff had not received any better deal than anyone else would have received.

**17.** On February 25, 1964, a hearing was held before an Appeals Examiner of the New York Region of the Civil Service Commission. Plaintiff was represented by counsel and was the only witness.

At the beginning of the hearing, plaintiff's counsel objected to the interrogation of plaintiff at the three interviews with the Revenue Service Inspectors (findings 2, 3, 4), which he referred to as a "pre-trial investigation," and urged that anything plaintiff said during such interviews should "be stricken

from the record and should be disregarded upon the ground that his rights were violated." He contended that "the right to counsel extends to pre-trial proceedings as well as to the hearing itself * * *." He contended that the procedure whereby, in the absence of any charges and without any prior notice, plaintiff was directed to appear at the Regional Office and was, without being advised of his right to counsel or to representation, interrogated, was illegal.

With respect to the purchase of the car in March 1958[7] plaintiff testified that, while he was looking at cars in Kinney's in March 1958, he "had a sudden hesitancy about buying the car from Kinney Motors due to the fact that I had examined them seven years previous and I must have indicated that to them, but it had no effect. I mean I resolved in my own mind that this was being a little bit squeamish and we [he and his wife] finally decided that we would buy the car there at Kinney's"; that he knew nothing of any relationship between Kinney Motors and Roosevelt Chevrolet, nor did he have any concern about the conditional bill of sale showing Roosevelt as the seller; that he did not know or remember at the time that Kinney was being audited by one of the approximately twelve agents in his group, although the records did show his initialed assignment of the Kinney return to an agent in his group in January 1958; that the use of Roosevelt was not as a subterfuge so that he could obtain any special consideration; and that all he was concerned about was the purchase of a car at a reasonable price, monthly payments he could carry, and good service.

As to Charge II, Specification 1, plaintiff admitted that in 1955 he made, upon the solicitation of Bomback, a former agent whom he knew, and who was then in the brokerage business, an investment in the Milbom Corporation, a syndicate of twenty individuals, in which Bomback was also a principal (which was later merged into the Jerilan Corporation), the purpose of the syndicate being to buy and sell securities; that of the $5,000 which he had put into Milbom, $2,000 was as an investment and $3,000 was as a loan to the corporation, which loan was repaid in two to three months; that he knew Bomback was, for a fee, managing the syndicate and that his brokerage firm would realize commissions on the

[7] The charges erroneously referred to the month as April.

purchase and sale of the Milbom securities; and that in 1956 Agent DeFeis, who was in his group, audited the Bombacks' 1954 income tax return pursuant to an assignment made by plaintiff, and that plaintiff had reviewed and approved the audit.

As to Charge II, Specification 2, plaintiff testified that the unassigned returns, previously selected for audit, which were sent to him by the Control Section were in turn given to certain key men in his group who, by a survey, would select (on the basis of the least tax potential) those which would be eliminated from audit requirement, and that all that remained for him to do was to stamp such returns "surveyed before assignment," initial them, and return them to Control; that, although he alone was authorized to stamp and initial for his group, he relied upon the judgment of his men as to which returns would be selected for elimination; that, if time permitted, he would take a certain portion of the returns himself for survey; that he disagreed with the procedure described in the Carruba affidavit (finding 14(b)), concerning the Group Supervisor's going over the selected returns himself, because it resulted in the same work being done twice, and that he himself simply relied on the judgment of the agents in his group as to their selections; that he recalled the number of returns sent to his group as between 400 and 600, and not 25 to 200 as stated by Carruba, and that it was not possible for the Supervisor himself to review all of such a large number of returns; that he also disagreed with the MacDonald affidavit (finding 14(b)) concerning the Group Supervisor's responsibility and that MacDonald himself told plaintiff to delegate the survey duty to his key men; and that he saw nothing improper in the Bombacks' 1956 return being closed by survey before assignment and that he had no interest at all in Bomback.

18. By decision of March 17, 1964, the Civil Service Commission's Appeals Examiner (and the Regional Director), concluding that the Internal Revenue Service had complied with all procedural requirements, that the agency's charges were supported by the evidence, and that the action taken to remove plaintiff was reasonable and for such cause as would promote the efficiency of the service, sustained the removal action.

As to Charge I, reliance was placed upon plaintiff's statements during his interviews with the Service Inspectors (findings 2, 3, 4), especially the interview of January 17, 1963, and the portions thereof quoted in finding 3. The Heingartner, Peters, and Barry affidavits, set forth in finding 5, were reviewed, as well as other exhibits showing that the 1956 tax return of Kinney Motors was assigned by plaintiff to an agent in his group on January 2, 1958, the audit being closed on April 29, 1958. Plaintiff's written (finding 8) and oral (finding 9) replies were also reviewed, as well as his testimony at the Commission hearing (finding 17). The decision rejected plaintiff's statement that he was not aware that an employee of his group was reviewing Kinney's 1956 return when he bought the car in March 1958. It also found that when he approved the employee's report concerning the Kinney audit in April 1958 plaintiff "knew that he had just a month before purchased a car from Kinney Motors." The Examiner further found that

> * * * the evidence discloses that because of appellant's doubts as to the propriety of his entering into a business transaction with Kinney Motors, the sale of the car was accomplished through Roosevelt Chevrolet Corporation. There is no doubt that this unusual transaction was carried out in this way so as not to disclose on the record that the appellant purchased the car from Kinney Motors. This subterfuge was initiated by appellant's questioning the propriety of his dealings with Kinney Motors and was acquiesced in by him when he signed the retail installment contract with the Roosevelt Chevrolet Corporation.

The decision noted "a serious discrepancy" between the Heingartner and Peters affidavits on the one hand and the Barry affidavit on the other in that the former stated the sale was accomplished through Roosevelt as a favor to Barry, but with Barry stating he was requested to arrange the sale in such manner as a favor to Kinney Motors.

It was accordingly concluded that plaintiff "had engaged in a financial transaction with a taxpayer, Kinney Motors, with whom he had an official connection, in violation of Section 29 of the Rules of Conduct." Plaintiff's contention that Section 29 "is too vague and indefinite" was rejected, it being

concluded that, although the "Rule is necessarily general in nature * * * [a]ppellant's conduct indicates that he was well aware of the Rule and its application" which was "borne out by the manner in which the sale of the car was accomplished." On this charge, the decision concluded:

> * * * Appellant's claim that Section 29 would be reduced to absurdity were it contended that because of an audit, employees of Internal Revenue Service would be prohibited from patronizing the taxpayer is not convincing. The facts of this case disclose a close, personal business relationship between the appellant and the taxpayer with whom the appellant had official business, and it is this close, personal relationship which brings his activities directly within the Rule.

As to Charge II, the decision also reviewed plaintiff's statements to the Inspectors concerning the $2,000 investment in, and the $3,000 loan to, the Milbom Corporation, and the consolidation of Milbom and Jerilan, of which Bomback was Vice President, the loan having been repaid but the investment being maintained throughout. The exhibits showing that, on January 3, 1956, plaintiff had assigned for audit to Agent DeFeis the Bombacks' 1954 return and had approved the agent's report, and that the Bombacks' return had been closed by survey before assignment on June 20, 1958, with the form stamp and plaintiff's initials appearing on the return, were also reviewed. The decision also reviewed plaintiff's written and oral replies, as well as his testimony at the hearing. It rejected plaintiff's contention "that his investment in Milbom was no different than in a mutual fund" since plaintiff was "sought out by Bomback" and in view of plaintiff's "loan to the Milbom Corporation of $3,000 and the limited number of investors in the Corporation (20)." It noted that Bomback "promoted" both Milbom and Jerilan, "and held high office in each, namely President and Vice President, respectively." It concluded that as long as Bomback and plaintiff "maintained their relative connection with the corporations, their financial association instituted in 1955 continued." On this charge, the decision concluded:

> * * * We cannot accept appellant's contention that there was no conflict of interest in that the tax returns in question were those of Bomback and not of the corporations, Milbom and Jerilan, in which he had a finan-

cial interest. We are of the opinion that the financial association between Bomback and appellant, begun in 1955, was not severed by the corporate veil as long as Bomback continued to promote the corporations and hold high office in them. It is our opinion that at the time appellant approved the audit of Bomback's 1954 tax return and surveyed before assignment Bomback's 1956 return, he had a financial association with Bomback and should have disqualified himself from the review of these returns. In the light of the foregoing, we find Charge II and its supporting specifications, I and II, are sustained by the preponderance of the evidence.

As to plaintiff's contention concerning the alleged illegality of the three interviews he had with the Internal Revenue Service Inspectors, it was noted that plaintiff had been advised of his constitutional right to decline to answer any incriminating question and that he had raised no objection to proceeding with the interviews. It stated:

> * * * A proceeding of this kind is not criminal or quasi-criminal but administrative in nature and any attempt by the appellant to relate it to pre-trial interrogation and investigation is improper. Appellant, as an employee of the agency, is required to and has the duty to cooperate with his superiors and fellow workers in their conduct of official business.

Finally, the decision rejected plaintiff's contention that, if there was a violation of the Rules of Conduct, it amounted only to a technical breach without wrongful intent, that there was no showing he had received any benefit or monetary gain from any such breach, and that, under the circumstances, the penalty of removal was too harsh. Plaintiff's statement to the Inspectors that he "probably got a better price" from Kinney on the automobile than anyone else would have received (finding 3) was noted in connection with his contention that he received no benefit or monetary gain from any of the matters contained in the charges. However, the decision went on to state that even had plaintiff received no monetary benefit, it would be immaterial.

> * * * Further, we must consider the nature of the work in which appellant was engaged. We believe that employees of the Internal Revenue Service must be held to strict accountability under the agency's standards of

conduct because of the nature of the work performed. To allow employees of the Internal Revenue Service to compromise their integrity or morality in any way could lead to serious consequences and a breakdown in our tax collection structure. For this reason, a breach of Section 29 of the Rules of Conduct even without any evidence of gain cannot be considered minor or technical. Appellant's 28 years of service should have underlined the importance of adhering strictly to the rules and if in doubt, resolve that doubt in favor of the agency. Instead, as the evidence indicates, he resolved all doubt in his favor without any attempt to seek the aid of his superiors or fellow workers.

The conclusion was that the "evidence fully supports" the charges "and that the action of removal, based upon the sustained charges and specifications was not arbitrary or capricious and was not procedurally defective."

19. Plaintiff appealed from the adverse decision of the Civil Service Commission's New York Regional Office to the Commission's Board of Appeals and Review. In said appeal he contended (1) that his rights were procedurally violated in that, in his three interviews with the Inspectors of the Revenue Service, he had not been "advised of his right to retain counsel, or to be represented"; (2) that the Internal Revenue Service had failed, by substantial evidence, to sustain its burden of proof that plaintiff was guilty of the charges; (3) the removal notice was defective because it failed specifically to indicate in what respect the dismissal would promote the efficiency of the service; and (4) the penalty of dismissal was unduly harsh.

20. By letter of October 22, 1964, the Civil Service Commission's Board of Appeals and Review affirmed the decision of the New York Regional Office. It reviewed each of the four points of plaintiff's appeal (pending 19). As to plaintiff's first point, the Board

> * * * noted that Mr. Kandall made no objection to proceeding with the interview after he had been advised of his Constitutional right to decline to answer any incriminating question. Further, the regulations of the Civil Service Commission and the agency prescribe the conditions under which employees may be represented by counsel or other person *after charges have been made;* they contain no provision for right of counsel in em-

ployee-supervisory discussion prior to notice of disciplinary action or adversary proceeding. (*Erenreich* v. *U.S.* Ct. Cls. #34–62, January 24, 1964.) Accordingly, the Board finds no procedural violation as alleged.

As to plaintiff's second point, the Board stated that it had reviewed the evidence, that it concurred in the Regional Office's analysis and evaluation of the pertinent documents "as well as Mr. Kandall's admissions," and that it concluded "that a preponderance of the evidence fully supports" the charges and specifications thereof involved.

As to the third point, the Board reviewed the agency's notice of decision, dated November 7, 1963 (finding 10), and concluded that the agency officials had therein "specifically identified the reasons upon which they relied to effect the action" and which supported their conclusion that plaintiff was being removed "to promote the efficiency of the service."

As to the fourth point (*i.e.*, that the penalty of dismissal was unduly harsh and severe), it concurred in the Regional Office's finding "that because of the very nature of their positions employees of the Internal Revenue Service must be held to strict accountability under the agency's standards of conduct."

**21.** At the trial herein, plaintiff was the only witness. In all material respects his testimony was substantially similar to the testimony he gave before the Appeals Examiner of the New York Region of the Civil Service Commission (finding 17).

### Ultimate Findings and Conclusions

**22.** No procedural defect in effecting plaintiff's removal is now claimed or is apparent.[8] Plaintiff duly received a notice of proposed removal advising of the offenses charged (finding 6); he replied to the charges, both verbally and in writing (findings 8, 9); and, after consideration, the District Director notified plaintiff of the charges and specifications that he concluded were sustained and stated that plaintiff would be

[8] Plaintiff's briefs do not reassert the alleged procedural defect contention he made before the New York Region of the Civil Service Commission (finding 17) and the Commission's Board of Appeals and Review (finding 19) to the effect that the failure to advise him of his right to have counsel during the three interviews with the Revenue Service Inspectors constituted an illegality. In any event, the disposition of the contention which both the Regional Office (finding 18) and the Appeals Board (finding 20) made was clearly proper.

removed on a specified date to promote the efficiency of the service (finding 10). Thereafter plaintiff appealed to the Civil Service Commission. He was granted a hearing before the New York Regional Office at which he testified and evidence was received. From that office's adverse decision, supported by a considered opinion analyzing the evidence in detail (finding 17), plaintiff appealed to the Commission's Board of Appeals and Review, from which he again received a decision which discussed every point he raised on his appeal (finding 20).

In such a case, it is well settled that, where there is no showing that the employee's removal was not in accordance with the procedures required by the pertinent statutes or regulations, "* * * this court will not review the action of the agency to determine whether there was just cause for removal." *Liotta* v. *United States*, 174 Ct. Cl. 91, 95 (1966). "* * * the determination of whether to separate an employee for the efficiency of the service is within the peculiar competence of the employing agency." *Indiviglio* v. *United States*, 156 Ct. Cl. 241, 246, *cert. denied*, 371 U.S. 913 (1962). As the court further held in *Liotta*, which also involved a discharge of an employee of the Internal Revenue Service: "It is only if the action of the District Director was shown to be arbitrary, capricious or so grossly erroneous as to imply bad faith that plaintiff's removal could be upset." 174 Ct. Cl. at 95. *Accord*, *Guiness* v. *United States*, 149 Ct. Cl 1,[9] *cert. denied*, 363 U.S. 819 (1960); *Morelli* v. *United States*, 177 Ct. Cl. 848 (1966);[10] *Holman* v. *United States*, 181 Ct. Cl. 1, 383 F. 2d 411 (1967);[11] and cases cited therein.

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[9] "It is not our function to substitute our judgment for that of the employing agency or the Civil Service Commission. Our review is limited to the sole question of whether their action was reasonable in the light of all the evidence." 149 Ct. Cl. at 6.

[10] "The power of removal from office in the executive branch of the Federal Government, absent some specific provision to the contrary, is incident to the power of appointment. *Keim* v. *United States*, 177 U.S. 290, 293 (1900). Where an administrative agency has complied with the prescribed procedural requirements, the Court of Claims can only review the action to determine whether the officials who effected the dismissal acted arbitrarily, capriciously or were so grossly erroneous as to be in bad faith, as for instance where they may have acted without substantial evidence to support their decision or where they exceeded their authority." 177 Ct. Cl. at 858.

[11] "The question is: does the record contain substantial evidence to support the administrative decision? *Moon* v. *Celebrezze*, 340 F. 2d 926, 930 (7th Cir. 1965). If it does the petition must be dismissed." 181 Ct. Cl. at 8, 383 F. 2d at 415.

23. (a) On the basis of the principles above set forth, it is plain that "plaintiff has failed to carry the heavy burden cast upon him" (*Greenway* v. *United States*, 175 Ct. Cl. 350, 353, *cert. denied*, 385 U.S. 881 (1966)) of showing that his discharge by the Internal Revenue Service was in any way arbitrary or capricious.

(b) As to plaintiff's purchase of the automobile in 1958 from Kinney Motors, it is plain that the District Director could, on the basis of (1) the facts admitted and the statements made by plaintiff at the three interviews with the Revenue Inspectors (findings 2, 3, 4); (2) the Heingartner, Peters, and Barry affidavits (and the conflicting statements therein) (finding 5); (3) the admissions and statements made in plaintiff's written and oral replies (findings 8, 9); and (4) the documents involved pertaining to the sale and the Kinney audits over the years made by plaintiff or agents in his group, reasonably conclude that the charge that plaintiff had, in violation of Rule 29 (finding 7), a "financial transaction" with taxpayer Kinney at the time he had "an official connection" with such taxpayer, was sustained. All such evidence, and especially the sworn admissions made by plaintiff in his interview with the Revenue Inspectors on January 17, 1963 (finding 3), was a sufficient basis for the District Director to conclude that (1) plaintiff knew he was in all probability violating Rule 29; (2) plaintiff did not wish to have the sale recorded as having been made by Kinney; (3) he "was aware of the subterfuge" indulged in of having the retail installment contract made out in Roosevelt Chevrolet's name; (4) he felt he was receiving preferred treatment on the transaction (finding 15(a)); and (5) such a violation of Rule 29 warranted plaintiff's dismissal "to promote the efficiency of the service."

(c) As to the charge based on plaintiff's reviewing and approving the audit of the 1954 Milton Bomback income tax return in 1956, as well as plaintiff's action in 1958 of closing by survey before assignment Bomback's 1956 return, plaintiff's proof fails to demonstrate that it was unreasonable for the District Director to conclude that plaintiff took such action while he had a "financial association" with Bomback, *i.e.*, plaintiff's investment in small investment syndicates (the

Milbom Corporation which was later consolidated into the Jerilan Corporation) in which Bomback was a principal (President of Milbom and Vice-President of Jerilan, and with Bomback's brokerage firm doing the buying and selling on commission, of the securities in which the corporations invested). As is shown by plaintiff's written reply to the charges (finding 8), there was really no dispute concerning the essential facts relating to this charge and the two specifications thereunder.

24. Similarly, where an employee has "pursued an appeal through the Civil Service Commission which upheld the action of the agency," the Commission's decision "is final and conclusive unless arbitrary or otherwise unlawful. *Blackmon* v. *United States*, 128 Ct. Cl. 288, 120 F. Supp. 774 (1954); [12] *Hoppe* v. *United States*, 136 Ct. Cl. 559 (1956), *cert. denied*, 355 U.S. 816 (1957); *Eclov* v. *United States*, 137 Ct. Cl. 341, 343 (1957)." *Liotta* v. *United States*, *supra*, 174 Ct. Cl. at 96.

On the basis of the evidence that was before the District Director, as above set forth, as well as the additional proceedings before the Commission (findings 13—20), including a full hearing before an Appeals Examiner, at which plaintiff testified (finding 17), it is plain that neither the careful, analytical decision of the New York Regional Office (finding 18), making findings adverse to plaintiff, nor the decision of the Commission's Board of Appeals and Review (finding 20), concluding "that a preponderance of the evidence fully supports" the charges, can be characterized as arbitrary or capricious.

25. (a) The contention that if plaintiff's conduct was wrongful, his action amounted only to a technical breach of the rules not warranting the harsh penalty of dismissal, cannot be accepted. The Internal Revenue Service did not em-

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[12] "As to the merits of a Government employee's dismissal, we do not review them, unless there is a showing of malicious or arbitrary action by the Government department which dismissed the employee. See *Gadsden* v. *United States*, 111 C. Cls. 487; *Levy* v. *United States*, 118 C. Cls. 106. Even if such action by the dismissing department is alleged, when the statute, here Section 14 of the Veterans' Preference Act, provides for an appeal to the Civil Service Commission where all questions involved in the dismissal may be reviewed, we will not review the decision of the Commission except to the limited extent necessary to determine whether its decision is supported by substantial evidence, considered in the light of the entire record. See *Bayly* v. *United States*, 99 C. Cls. 598." 128 Ct. Cl. at 291, 120 F. Supp. at 775–76.

ploy any standard code of penalties (finding 15(a)) under which, for instance, the penalty of discharge for the offenses herein involved would not be appropriate. *Cf. Cohen* v. *United States*, 177 Ct. Cl. 599, 619–20, 369 F. 2d 976, 988–89 (1966), *cert. denied*, 387 U.S. 917 (1967). Accordingly, "* * * absent the violation of any agency regulation fixing appropriate corrective measures for various offenses (*Daub* v. *United States*, 154 Ct. Cl. 434, 292 F. 2d 895 (1961)), the disciplinary action to be taken is a discretionary matter for the agency itself." *De Nigris* v. *United States*, 169 Ct. Cl. 619, 625 (1965). *Accord*, *Liotta* v. *United States*, *supra*, 174 Ct. Cl. at 96, and cases cited therein.

(b) Furthermore, the bases for the "technical breach" contention were all considered by the agency and the Civil Service Commission, and it cannot be concluded that their rejection thereof was unreasonable. These bases are as follows:

1. Plaintiff claims he did not knowingly violate any conduct rule, *i.e.*, (a) he did not know of Roosevelt Chevrolet's part in the sales picture, nor did he play any part in any "subterfuge" whereby the sale was made to appear as having been made by Roosevelt instead of by Kinney Motors; (b) he did not know that the Kinney Motors 1956 income tax was being audited in his group at the time of his purchase of the automobile; (c) he was not cognizant of and had no control over the assignment of the Bombacks' 1954 income tax return to his group for audit; and (d) he did not know that the Bombaeks' 1956 income tax return was among those which he and his group had closed by survey without assignment. However, the contrary agency and Civil Service Commission findings, which rejected plaintiff's contentions concerning his alleged lack of knowledge (findings 15(a), 18) are plainly supported by substantial evidence and cannot be held to be unreasonable.[13]

[13] Plaintiff admitted at the trial that although the assignment of the returns to his group for audit was made by the Control Section, he would indicate his acceptance of the assignments by placing his initials on the returns. (Transcript p. 45) In addition, he kept a list in his office of all the returns that were assigned to his agents. (Tr., p. 70) Furthermore, after the agent in his group completed his audit, plaintiff was responsible for reviewing the audit report. (Tr., p. 46) Similarly, plaintiff was responsible for initialing (in a location on the return adjacent to the taxpayer's name) every return closed by survey before assignment. (Tr., p. 74)

2. Plaintiff furthermore claims that Section 29 of the agency's Rules of Conduct is too vague and indefinite. The Civil Service Commission's conclusion that, although the Rule "is necessarily general in nature," plaintiff's "conduct [with respect to the automobile purchase] indicates that he was well aware of the Rule and its application," (finding 18) is wholly reasonable. The rejection of plaintiff's further contention that the Service's interpretation of Section 29 was unduly restrictive in that it would prevent employees of the Service from even patronizing in any way many taxpayers in the District was also justified. In the first place, plaintiff's group was only one of several in the District. It did not, in any particular year, cover the entire District. Secondly, the automobile transaction in question, characterized by the Heingartner and Peters affidavits themselves as having been "handled in an unusual manner" (findings 5 (a) and (b)), cannot properly be compared with a routine purchase of an article from a taxpayer located in the District.

3. The further contention with respect to Rule 29 that the prohibition against employees having financial transactions with "taxpayers having cases pending before the Bureau or field offices with which such employees have an official connection" (finding 7) does not cover "the mere filing and routine checking of a taxpayer's annual income tax return" and that "a 'case pending' within the meaning of that rule must encompass some element of a disputed claim or controverted issue" (plaintiff's brief, p. 6) is not sustainable for two reasons: (a) it is plain, as plaintiff himself admitted at the trial, that in the Service's terminology, which plaintiff well understood, any return which was to be audited was referred to as a "case";[14] and (b) it appears that this contention is being made for the first time in this court. Plaintiff's failure to raise this issue administratively thus constitutes a failure to exhaust his administrative remedies and precludes its presentation here. *Pine* v. *United States*, 178 Ct. Cl. 146, 371 F. 2d 466 (1967), and cases cited therein.

4. Plaintiff contends that there is no showing that he ever received any favors or monetary benefits as a result of the

[14] Transcript, p. 37. Throughout his testimony, plaintiff referred to such returns as "cases." See *e.g.*, Tr., pp. 45, 54, 70, 101.

incidents forming the basis of the charges, or that, in turn, he ever gave any favors or any kind of unwarranted favorable consideration to the taxpayers involved. However, again the Civil Service Commission's disposition of these contentions was reasonable. First, it pointed out plaintiff's own admission to the Revenue Inspectors that he "probably got a better price" on the automobile than anyone else would have received (findings 3, 18). Secondly, it held that (a) because of "the nature of the work in which appellant was engaged," (b) the fact that "employees of the Internal Revenue Service must be held to strict accountability," and (c) that any "compromise" of the "integrity or morality" of such employees "could lead to serious consequences and a breakdown in our tax collection structure," the actual existence of such favors, benefits, or monetary gain was in any event irrelevant (finding 18). *Cf. United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 548–51 (1961). Revenue agents especially must be "above board, in all their dealings with the taxpaying public." *Liotta* v. *United States*, *supra*, 174 Ct. Cl. at 97.

(c) It is true that where the employee's offense is, considering all the facts and circumstances, so minor that a discharge based thereon would be "unduly harsh and unwarranted" and would therefore constitute "an abuse of discretion by the agency that demands redress by this court," the court may hold the discharge to be unlawful and award a back pay recovery. *Clark* v. *United States*, 162 Ct. Cl. 477, 484–85 (1963). However, for the reasons set forth, this case would not be an appropriate one for the application of such doctrine.

## Conclusion of Law

Upon the foregoing findings of fact and conclusions of law, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover and the petition is dismissed.